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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1015

MAYFAIR MEAT PACKING CORPORATION AND JOHN CARR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not render an opinion. Its judgment appears at pages 76 and 77 of the record. The opinion of the Circuit Court of Appeals (R. 95–98) is reported at 158 F. 2d 685.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 11, 1947 (R. 99). An order extending until February 14, 1947, the time within which to file a petition for certiorari was

entered on February 10, 1947 (R. 100). The petition for the writ of certiorari was filed on February 11, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347 (a)).

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals was correct in holding that the record showed that the basis of the trial judge's denial of the motion for leave to file a complaint in the Emergency Court of Appeals under Section 204 (e) of the Emergency Price Control Act was petitioners' failure to meet the "good faith" requirements of that section.

2. Whether it is an abuse of discretion for a trial judge to hold that objections to a price regulation set out in a motion for leave to file a complaint in the Emergency Court of Appeals under Section 204 (e) were not made in "good faith," where the objections apparently had been rejected by prior decisions of the Emergency Court of Appeals.

3. Whether the district court had jurisdiction to determine the validity of a price regulation in a criminal proceeding for violations during 1945 of the Emergency Price Control Act, against a defendant who took no steps to protest the regulation prior to the filing of the information.

STATUTE AND REGULATIONS INVOLVED

Section 204 (e) of the Emergency Price Control Act, as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, 901 et seq.) is set forth in the Appendix.

STATEMENT

Petitioners are a corporation and its president, engaged in the wholesale-meat business. On April 22, 1946, an information containing twenty-one counts, nineteen founded on sales of meat in violation of Revised Maximum Price Regulation No. 169, as amended (7 F. R. 10381; 10 F. R. 6182), one alleging failure to keep proper records under that regulation and one for violation of Maximum Price Regulation 389 (8 F. R. 5903) was filed. (R. 7–21.) On June 3, 1946, petitioners made a motion for leave to file a complaint in the Emergency Court of Appeals under Section 204 (e) of the Emergency Price Control Act, setting forth objections to the validity of Revised Maximum Price Regulation 169. The chief ground alleged in support of the claim of invalidity was the lack of control of live-cattle prices and the ineffectiveness of Maximum Price Regulation 574, as amended (10 F. R. 1270, 3691, 4099) which established buyers' ceiling price for livestock, to effect adequate control of the live-cattle market. (R. 27–33.) The affidavits accompanying the motion set forth the pendency of numerous other protests as petitioners' reasonable excuse for failure to protest earlier (R. 25–26).

This motion was denied by District Judge Holtzoff, sitting in the Southern District of New York, without opinion (R. 63). Judge Holtzoff subsequently upon request, stated in a letter to the United States Attorney that he denied the motion because the validity of the regulation had already been upheld by the Emergency Court of Appeals in previous cases; he specifically disclaimed any decision on whether petitioners made out the required "reasonable and substantial excuse" for their previous inaction (R. 41).

Petitioners pleaded guilty and were sentenced. They were fined five thousand dollars jointly and severally on Count 2. On Count 1, John Carr was sentenced to eight months imprisonment and was also given concurrent suspended sentences of a year on each of the remaining counts. (R. 76, 77.)

Petitioners moved in arrest of judgment on the ground that Revised Maximum Price Regulation 169 was invalid for the reasons set out in the original motion (R. 80–82). This motion was denied (R. 90).

On appeal from the judgment, petitioners urged that it was an abuse of discretion to deny their motion for leave to file a complaint on the ground stated, particularly since the prior decisions of the Emergency Court of Appeals allegedly did not foreclose their success in that court. They also urged that the District Court had jurisdiction to consider the validity of the regulation. The Cir-

cuit Court of Appeals for the Second Circuit affirmed, holding that the whole record showed that the trial judge had found that petitioners were lacking the required "good faith," in that they could not really believe that their complaint would be successful. It also noted that there was no jurisdiction to consider validity of the regulation in the District Court. (R. 95–98.)

ARGUMENT

1. Section 204 (e) (1) of the Emergency Price Control Act provides that the defendant in any criminal proceeding under the Act may apply for leave to file a complaint in the Emergency Court of Appeals setting forth objections to the validity of any provisions which the defendant is alleged to have violated. Leave is to be granted with respect to any objection which the court finds is made in good faith and with reasonable excuse for failure to file a protest. The trial judge did not make any decision with respect to the "reasonable excuse" requirement but stated in a letter which was the equivalent of an opinion that he found the application "lacking in merit" (R. 41). Other portions of the record show, as the Circuit Court of Appeals found, that this statement and the denial of the motion were not intended as a direct ruling on the validity of the regulation, but as a holding that it was inconsistent with petitioners' "good faith" to present objections of an insubstantial nature, which were bound to be

overruled. The trial judge in subsequent proceedings demonstrated that he knew he could not determine the validity of the regulation by remarking that "If the Court had jurisdiction," it would hold the regulation valid (R. 90). Earlier, he had declared that if the objections raised by petitioners had already been decided, he would regard their motion as "dilatory and possibly frivolous" (R. 52). See also R. 51–52, 57, 58, 59. In the context of these comments, the purpose of his consideration of the decisions of the Emergency Court of Appeals is clarified and shown to be part of his determination of the "good faith" issue.

2. The bearing of the substantiality of the objections to the price regulation upon the issue of good faith is evident. Leave to file a complaint under Section 204 (e) was intended as an unusual privilege for truly deserving cases, not as a matter of right. *Dowling Bros. Distilling Co.* v. *United States,* 153 F. 2d 353 (C. C. A. 6), certiorari denied *sub. nom. Gould* v. *United States,* 328 U. S. 848; *United States* v. *Aronin,* 57 F. Supp. 186 (S. D. N. Y.); statement by Senator Wagner, presenting the Conference Report (H. Rep. No. 1698, 78th Cong., 2d Sess.) to the Senate, 90 Cong. Rec. 6368. Relief was to be limited to those who might have successfully challenged a regulation but for excusable failure to protest (S. Rep. No. 922, 78th Cong., 2d Sess., p. 13); it was reiterated in the debates that repeated at-

tacks on the validity of a regulation of a kind already decided should not be countenanced under this section (House debates, 90 Cong. Rec. 5869, 5870, 5871). Certainly, then, it was no abuse of discretion to hold that it was with a dilatory intent and, therefore, not in good faith, to present insubstantial challenges to the regulation.

The trial court was completely justified in holding that the petitioners' objections were insubstantial in the light of the prior decisions of the Emergency Court of Appeals. Petitioners were non-processing slaughterers and wholesalers (R. 81). Their motion presented general objections to Revised Maximum Price Regulation 169 based on the lack of control of the livestock market, and the ineffectiveness of Maximum Price Regulation 574 insofar as it established such control. Petitioners admittedly claimed invalidity on the same grounds as were urged in numerous other protests, and did not rely on any particular facts in relation to their own business (R. 24, 44, 46). The objections outlined in their proposed complaint were considered and rejected in *Heinz* v. *Bowles,* 149 F. 2d 277, upon reconsideration, 150 F. 2d 546, certiorari denied *sub nom. E. Kahn's Sons Company* v. *Bowles,* 326 U. S. 719, which held that the regulation, taken together with the livestock subsidy program, was currently valid as to non-processing slaughterers. See also, *Armour & Co.* v. *Bowles,* 148 F. 2d 529 (E. C. A.), certiorari denied, 325 U. S. 871; *Oswald & Hess Co.*

v. *Bowles,* 148 F. 2d 543 (E. C. A.), certiorari denied, 325 U. S. 871; *Horns* v. *Bowles,* 151 F. 2d 191 (E. C. A.); *Ben H. Rosenthal & Co., Inc.* v. *Porter,* 158 F. 2d 171 (E. C. A.), for decisions on the general validity of Revised Maximum Price Regulation 169. The *Heinz* decision was announced on July 31, 1945, and its determination of current validity covered the very period of petitioners' violations, June through August 1945.

Petitioners' objections to Maximum Price Regulation 574 do not raise issues outside the scope of the *Heinz* decision, for the opinion in that case upheld Revised Maximum Price Regulation 169 on the basis of the actual profits of the non-processing slaughterers during 1944, when there was no price control over the livestock market other than the cattle stabilization plan of subsidy payments, as well as the early months of 1945, when Maximum Price Regulation 574 was in effect. The direct control over livestock prices in the latter Regulation reinforced rather than weakened the reasoning of the *Heinz* decision, and it has been so held recently in *Federated Meat Corp.* v. *Fleming,* E. C. A. February 12, 1947, not yet reported. In view of this decision, petitioners' proposed complaint could now serve only a dilatory purpose.

3. The question left open by this Court in *Yakus* v. *United States,* 321 U. S. 414, as to the possible right of a diligent defendant to assert the invalidity of the controlling price regulation in a

criminal proceeding is not, on the facts, involved in this case. Petitioners failed to take any action to procure a determination of the validity of the regulation until they were subjected to criminal prosecution. They cannot with success claim to have been "forced to trial * * * while diligently seeking determination of * * * validity by the statutory procedure" (*Yakus* v. *United States, supra,* at 447). However, even should petitioners be thought to be within the *caveat* of the *Yakus* opinion, the district court would have no jurisdiction to determine the validity of the regulation. The liberalized provisions for stays were added to the Act by the Stabilization Extension Act of 1944, 58 Stat. 639, for the express purpose[1] of destroying any basis for the possible exception to the exclusive jurisdiction doctrine. The amendment of 1944 has been recognized as eliminating the due process issue undecided in the *Yakus* case. *United States* v. *George F. Fish, Inc.,* 154 F. 2d 798 (C. C. A. 2), certiorari denied, 328 U. S. 869; *United States* v. *Tantleff, et al,* 155 F. 2d 27 (C. C. A. 2) certiorari denied *sub nom. Lieberman* v. *United States,* 328 U. S. 869.

[1] See the remarks of Senator Danaher, quoting the sentence reserving this issue in the *Yakus* case, and then adding (90 Cong. Rec. 5305): "But in what we have done we have perfected the two points as to which the Supreme Court had entered no decision, to the end that there can be no question of the denial of or the existence of due process. Thus we afford a remedy which is a complete answer in both those respects, because we give the citizen time within which he can file the protest."

CONCLUSION

The decision of the court below was correct. There are no conflicts of decision, and no question of general importance is involved. The petition should be denied.

Respectfully submitted.

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MARCH 1947.

APPENDIX

Section 204 (e) of the Emergency Price Control Act as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, 901 et seq.):

> SEC. 204 (e) (1).[1] Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code,[2] involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate.[3] The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a com-

[1] Entire Subsection (e) added on June 30, 1944, by 58 Stat. 632.

[2] Last ten words added on June 30, 1945, by 59 Stat. 306.

[3] Last four words added on June 30, 1945, by 59 Stat. 306.

plaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code,[2] involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provisions;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 of this Act or section 37 of the Criminal Code,[2] setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to

[2] Last ten words added on June 30, 1945, by 59 Stat. 306.

such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code;[2] nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

[2] Last ten words added on June 30, 1945, by 59 Stat. 306.

U. S. GOVERNMENT PRINTING OFFICE: 1947